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PETITION  
EXPEDITED PROCEDURE  
EXAMINING ART UNIT 3617

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: James George Allen et al  
Serial No.: 10/751,620 Art Unit: 3617  
Filed: January 6, 2004 (Robert J. McCarry, Jr.)  
Title: Control Device For A  
Railroad Car

FAX 571-273-8300

Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

PETITION UNDER 37 CFR 1.181 TO COMMISSIONER  
FOR SUPERVISORY REVIEW

Dear Sir:

Applicants petition for withdrawal of the Final Rejection (FR) of June 24, 2005, clarification of various portions of the FR of June 24, 2005, and a new period for response to be set with a new and complete Office Action.

STATEMENT OF FACTS

1. The Amendment (AM), filed April 4, 2005 and incorporated by reference herein, added Claims 19-35. No response was made by the Examiner to arguments on pages 28-37 of the AM relative to the distinctions of each of claims 19-35 from Rosenbaum and Ward. The Examiner has not identified in Rosenbaum or Ward any structural limitation, which has been stated in the AM as not being in Rosenbaum and Ward.

2. During a first telephone interview (FTI) on July 11, 2005, claims 2-4 and 18 were initially discussed before claim 1. No

other claim was discussed because the Examiner said that he did not have time and agreed to call applicants' attorney later.

3. During the FTI, the Examiner was unable to point out where the limitations of claim 2, as discussed on page 26 of the AM, were disclosed in Rosenbaum or Ward. No identification in FR of a pressure responsive device in Rosenbaum between a source of air pressure and the piston to block supply of air pressure in the first direction for preventing the air pressure from acting in the first direction on the piston until the air pressure exceeds a predetermined amount. In Rosenbaum, there is no pressure responsive element between the air reservoir 154 and the piston 142 to block supply of air pressure in the first direction to act on the piston 142 to cause movement of the door 34 or 36 to its open position for preventing the air pressure from acting in the first direction on the piston 142 until the air pressure exceeds a predetermined amount. Instead, air pressure continuously acts on the piston 142 of Rosenbaum until it fills the first chamber to a predetermined amount of air pressure as stated in lines 5 and 6, page 4 of FR. Thus, the control assembly 152 of Rosenbaum does not have this claimed structure.

4. The Examiner also was unable to set forth where the limitations of claim 3, as discussed on pages 26 and 27 of the AM, were found in Rosenbaum or Ward. There is no first air passage in the housing, which the Examiner has identified as the cylinder 136 in Rosenbaum, communicating with a source of air pressure to cause air pressure to act on the piston 142 in the

first direction to move the piston to its door opening position when the piston is in its door closing position. The pressure responsive element comprises a first portion movably disposed in the first air passage, which is in the housing (cylinder 136 of Rosenbaum). There is no pressure responsive element having a first portion movably disposed in a first air passage in the housing (cylinder 136 of Rosenbaum).

The pressure responsive element also has a second portion holding the first portion in a passage blocking position until the air pressure exceeds a predetermined amount. There is no second portion in Rosenbaum holding the first portion, which is movably disposed in the first air passage in the housing, in a passage blocking position.

5. During the FTI, the Examiner was unable to explain where the limitations of claim 4, as discussed on page 27 of the AM, were shown in Rosenbaum or Ward. Claim 4 recites that the second portion of the pressure responsive element is a resilient element disposed in the first air passage, which is in the housing (identified by the Examiner as cylinder 136 of Rosenbaum) and communicating with a source of air pressure. Claim 4 also requires the resilient element to continuously urge the first portion of the pressure responsive element into its passage blocking position when the air pressure does not exceed the predetermined amount. Rosenbaum does not have this structure, and the Examiner admitted that it did not during the FTI.

6. During the FTI, the Examiner was unable to point out where the limitations of claim 18, as discussed on page 28 of the AM, were found in Rosenbaum or Ward. Claim 18 recites the control device as comprising a resiliently biased control element for preventing movement of the piston to its door opening position until the air pressure acting on the piston exceeds a predetermined amount.

7. During the FTI, it was understood that the Examiner deemed claims 2-4 and 18 allowable when claim 2 was rewritten in independent form since he could not find the limitations of claims 2-4 and 18 in Rosenbaum. However, he would not provide a new Office Action as applicants' attorney requested. Instead, it was understood that a second telephone interview (STI) would be held during the week of July 18.

Applicants' attorney initiated the STI on July 18. During the STI, applicants' attorney stated, as he had in the FTI, that he could not understand the Examiner's position concerning claim 1 in which the Examiner contended that the "control element" was "too broad" even though he would not state where the limitation of "a control element for preventing air pressure from acting in the first direction on the piston until the air pressure exceeds a predetermined amount" of claim 1 was in Rosenbaum.

When applicants' attorney requested a new Office Action after the Examiner's continued refusal to identify where the claimed limitation of claim 1 was in Rosenbaum, the Examiner requested a written response to the FR. Applicants' attorney

advised him that this petition would be filed in response to his request for a written response since his rejection of any claim could not be understood including claims 2-4 and 18, which it was previously believed that he considered allowable for the reasons set forth in the AM since the FR has no indication of such allowability and he was not willing to issue a new Office Action. As previously mentioned in section 1, no response to the arguments concerning the distinction of claims 19-35 on pages 28-37 of the AM from the applied prior art has been made by the Examiner.

8. As to claim 1, lines 14-16 of claim 1 require a control element for preventing air pressure from acting in the first direction on the piston until the air pressure exceeds a predetermined amount. This is set forth in the last four lines on page 24 of the AM. Thus, this claim is not reciting a build up of pressure in a chamber to a predetermined amount of pressure as set forth in lines 1-6 on page 4 of the FR. Furthermore, no air pressure can act on the piston until it exceeds a predetermined amount whereas Rosenbaum has the air pressure continuously act on the piston 142 until it fills the first chamber to a predetermined amount of pressure (lines 5 and 6, page 4 of FR). This absence of the limitation in Rosenbaum was explained in the only complete paragraph on page 25 of the AM. During each of the FTI and STI, the Examiner's response was that the control element was "too broad." However, his interpretation

of Rosenbaum in FR does not explain how this limitation of the control element of claim 1 is met as discussed in section 7.

9. Therefore, the Examiner has not complied with 37 CFR 1.104 since the rejection of claims 1-4 and 18-35 cannot be understood because no structure has been referenced by the Examiner other than to claim 1 and it is not understood as discussed in sections 7 and 8. The propriety of continuing the prosecution, as set forth in 37 CFR 1.104(a)(2), can not be judged from the FR.

10. Applicants are entitled to have the Examiner's positions explained and understood prior to filing any appeal, particularly where the Examiner has not identified any element in any claim other than claim 1. It is submitted that no clear issue has been developed between the Examiner and applicants. Section 706.07 of the MPEP states:

"Before final rejection is in order a clear issue should be developed between the examiner and applicant."

This has not occurred with this FR.

11. The paragraph bridging pages 2 and 3 of the FR added the following to the Examiner's description of Rosenbaum in the first Office Action: "Once the pressure (sic) in one piston (sic) the control valve 158 operates the output ports so to then operate the double acting piston to move. The control assembly is further comprised of solenoids controlled by switches, which are controlled by the operator of the vehicle. The switches allow the operator to control the opening of the doors until the vehicle has reached a predetermined point."

The first of the sentences is not understood since there are missing words, and this warrants a new Office Action. Thus, the added material is not understood.

Furthermore, Rosenbaum does not discuss a predetermined position along a predetermined travel path at which the doors are to open as this can occur only with a railroad car. The Examiner referenced a "predetermined point" in line 4, page 3 of FR, but this is not what is claimed.

12. The first complete paragraph on page 3 of FR states: "It would have been obvious to one of ordinary skill in the art to understand that a door assembly, like that of Rosenbaum could have been applied to a railroad car." This is not sufficient to show obviousness according to MPEP §2143.01 (right column, first complete paragraph, page 2100-131) so that the Examiner has not complied with MPEP §2143.01.

13. The paragraph bridging pages 3 and 4 of FR said in part: "Applicant (sic) argues that the prior art references cannot be combined since they are different, such that one is a railroad car and the other is a road trailer. The Examiner has combined the two references based on the body construction and the hopper gate controls. It is clearly visible that the two vehicles, regardless of their mode of transportation. (This sentence is incomprehensible as some language is missing so that the Examiner's position cannot be understood.) It is understood that whether the vehicle is moved over rails or a road is merely intended use since the bodies are of the same basic construction.

Applicant (sic) also argues that the device does not allow for a build up of a predetermined amount of pressure. The Examiner has interpreted that since there is a conduit (not identified by Examiner and applicants do not believe exists in Rosenbaum) connecting the two chambers of the double acting piston, then the pressure would build up in one chamber before it is exhausted or overflowed to the second chamber. Therefore allowing the first chamber to fill to a predetermined amount of air pressure."

(emphasis added)

This is not understood for several reasons. First, as to "mere intended use," all words in a claim must be considered in judging the patentability of that claim against the prior art (MPEP §2143.03 (first paragraph, page 2100-133)) and the Examiner has not done this by his statement. Second and more important, the claims do not allow any pressure in a chamber until the supplied pressure exceeds a predetermined amount, and this is what applicants contended in the AM, not that the chamber is filled to a predetermined amount as lines 5 and 6, page 4 of the FR state.

14. The explanation of motivation for combining Rosenbaum and Ward in FR is not believed to be in accord with MPEP §2143.01 (right column, page 2100-131) and In re Kotzab, 55 USPQ2d 1365, 170 (CAFC, 2000) on page 2100-130 wherein motivation requires (1) problem solved, (2) teaching of prior art, and (3) knowledge of persons of ordinary skill in the art for an implicit showing. In the AM, the bridging paragraph on pages 23 and 24 and both

complete paragraphs (particularly the second) on page 24 explain that neither patent has any suggestion of recognizing or solving the problem of insuring that material within the railroad car is released by opening the door when the air pressure exceeds a predetermined amount and that inadvertent opening of the door can occur prior thereto. This is discussed in line 25, page 1 - line 26, page 2 of the application. Thus, there is no motivation as "problem solved" is one requirement for an implicit showing.

15. Section 706.02(j) of the MPEP sets forth in the final complete paragraph, left column on page 700-46 that the prior art must teach or suggest all the claim limitations and that the combination must not be based on applicants' disclosure but must be found in the prior art.

There has been no compliance by the Examiner with section 706.02(j) of the MPEP since there is no suggestion or motivation to modify Rosenbaum by Ward. The references must expressly or impliedly suggest the claimed invention, and they do not.

Claim 22, for example, is limited to the material being released only at a predetermined position along a predetermined travel path. Ward teaches away from this since the material is selectively discharged at several points as stated in the first complete paragraph on page 24 of the AM.

#### POINTS TO BE REVIEWED

1. The Examiner has not complied with 37 CFR 1.104 and 35 USC 132 in that portions of the Final Rejection cannot be understood as discussed in numerical sections 1 and 3-14 of STATEMENT OF FACTS.

2. The Examiner has not complied with Section 706.07 of the MPEP in that a clear issue has not been developed as discussed in section 10 of STATEMENT OF FACTS.
3. The Examiner has not complied with Section 706.02(j) of the MPEP for the reasons set forth in section 15.
4. The Examiner has not complied with Section 2143.01 of the MPEP for the reasons set forth in sections 12 and 14.
5. The Examiner has not complied with Section 2143.03 of the MPEP for the reasons set forth in section 13.

ACTION REQUESTED

It is respectfully requested that the Final Rejection be withdrawn, a new Office Action be issued with a new response date including clarification of the Examiner's positions as discussed in sections 1 and 3-14 of STATEMENT OF FACTS, clarification of the missing language in the Final Rejection as discussed in sections 11 and 13 of STATEMENT OF FACTS, and compliance with Sections 706.07, 706.02(j), 2143.01, and 2143.03 of the MPEP.

Respectfully submitted,

  
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Frank C. Leach, Jr.  
Attorney for Applicants

A.C. 859, 266-0169

CERTIFICATE OF TRANSMISSION

I hereby certify that this correspondence is being facsimile transmitted to the United States Patent and Trademark Office, Fax No. (571)-273-8300 on July 23, 2005.

By Frank C. Leach, Jr.  
Date July 23, 2005